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Adjudication and the public realm
An analysis based on the work of Hannah Arendt*

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1. Introduction

During the last few decades, in many countries the status and authority of the judiciary have changed. Judges are amongst the last professionals to have lost their seemingly unquestionable authority. Now, judges are under extreme pressure to account for their conduct.[1] The accountability of the judiciary as a whole can be understood because of developments in modern democratic society. Emancipated citizens nowadays demand transparency as far as public bodies are concerned, and at the same time they want to see these bodies account for their particular interests. This critical attitude towards public bodies has led to several changes in the organization of the government, and also of the judicial administration. Amongst other things, one will find a greater sense of awareness as regards the costs of dispensing justice, and also more attention is paid to the treatment of the parties in lawsuits. On the whole, a more managerial perspective as regards adjudication seems to have developed which also implies a customer-friendly attitude by the representatives of the judicial administration. To put it succinctly: one can discern a kind of rationalization, on the one hand, and a personalization on the other. From the perspective of democracy much can be said in favour of these developments. Still, some questions can be raised. Notions of efficiency, management and customer-friendliness are strongly associated with the private sector and companies, so that it can become a question of whether they unconditionally fit the judiciary and its activities. Traditionally, it is understood that the judiciary has to serve the public interest and that it cannot offer its services on the private market in which it is competing with other suppliers. Adjudication is not seen as a commodity that is offered on this market.

In this article, the possible tension between adjudication understood as a public service, on the one hand, and the inevitable tendencies in a modern democracy encompassing the rationalization and personalization of this service, on the other, will be analysed. It will be shown that these tendencies in themselves do not have to be problematic, but that some particular manifestations thereof indeed are. To understand why this is the case, we need a thorough understanding of the public character of adjudication and its significance for society as a whole. It will be shown that

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1 For more on this in the Dutch context see A. Hol et al., *Reshaping Justice. Judicial Reform and Adjudication in the Netherlands*, 2004, especially pp. 67-88.

the notion of the public realm, as elaborated by Hannah Arendt, gives us an interesting and important starting point for such an understanding. While her thinking provides strong foundations for modern democracy, it also provides a footing for a critical analysis of the rationalization and personalization of modern society. The insights of Arendt will be used to understand and to critically assess recent developments in law and adjudication. Not only will we discover the crucial part which the judiciary plays in a democratic society, but also that to be able to play this part some limits of rationalization and personalization must be respected. First, the notion of the public realm will be elaborated. Next, it will be explained why law and adjudication can be understood as prerequisites of this public realm. After that, the phenomena of rationalization and personalization in modern society will be analysed. It will be explained how these phenomena can disintegrate the public realm, and also how they affect law and adjudication. At the end a positive account of law and adjudication as the backbone of the public realm will be given, in describing their place in the public realm 'middle' between a rational and a personal approach.

2. Arendt's work and its significance for analysing law and the administration of justice

There is little reference to law in Hannah Arendt's work; in any case there is no detailed legal theory to be found. Nevertheless her ideas lend a number of insights that are useful to reflect upon in connection with contemporary legal theory. Her analysis of the public realm offers such an insight. Arendt understands this realm as a space within which people can communicate with each other on an equal basis and, through debate, they can give structure to the organization of society.

Law and the administration of justice form the backbone of this public space, because they protect the equal rights of everyone, enabling participation in society and also providing a structure within which everybody can participate in discussions with each other. Arendt, however, is quite gloomy about the significance of such a public space in modern society. For various reasons she sees it crumbling away. There is increasingly less room in modern society for the citizen to participate in discussions and decision-making processes that have to do with the organization of society. It can only be expected that a similar erosion will take place in the field of law because it forms part of the basic public realm structure. The crisis in the legitimacy of the law enforcement authority and also in the administration of justice seems to bear witness to this.

The motivation behind Arendt's political theory is to expose, as far as possible, the significant meaning and importance of the public realm for human society in the hope of providing an intellectual counterbalance to its decline and prevent further erosion.[2] An attempt will be made here to build on Arendt's ambition by elaborating further on the law and the administration of justice.[3]

2 Arendt chiefly picked her examples from the Greek and Roman world which clearly underlines how much she was convinced that there were only rudimentary signs of what she considered the true political community within present-day society.

3 Within the territory of the Dutch language Focqué and 't Hart have already done the necessaries in this field and have demonstrated in a distinctive way how the ideas of Arendt can be made fruitful within legal thinking. Cf. amongst others R. Foqué et al., *Instrumentaliteit en rechtsbescherming*, 1990; R. Foqué, *De ruimte van het recht* (inaugural lecture), 1992.

3. The public realm

As already mentioned, law and its practices have their place in what Arendt calls the public realm. The function of this realm is to give stability to human existence, which is constantly threatened by futility and meaninglessness. This futility and meaninglessness are unavoidable given our human state of mortality. It is knitted into the individuality of an individual that he can only understand the nature of his existence as being temporary and not having any permanent meaning. According to Arendt the individual has to rise above the private realm in order to lead a meaningful life and to acquire an individual identity. Renown can be won and immortality achieved by performing special deeds in the presence of others. However, in order to appear in the presence of others something like a shared world is needed, a man-made artefact that makes it possible for us to relate to each other. This is the public realm. Arendt points here to the Greek polis and the Roman *res publica* that she understands as the 'guarantee against the futility of individual life, the space protected against this futility and reserved for the relative permanence, if not immortality, of mortals' [4] The public realm must be seen as the world within which individuals rise above their strict personal and private realms and enter into relationships with others. For Arendt relationships are only possible if there is a certain distance between individuals. In order to bring people together one has to separate them first. The world of the public realm has an intermediary character because by bringing people together it also comes to stand between them. This viewpoint of the public realm as an in-between space comes from the weight that Arendt lends to the idea of plurality. Although the public realm treats all people as equals, within which everybody has an equal position and can participate in the discussions that take place there on an equal footing, this space also recognises the uniqueness of everybody and thus also the plurality of human society. According to Arendt the in-between space, that keeps people apart, must not be seen as an empty space. When she speaks about the public realm as an artefact then we have to take this literally. It is something that both separates and brings people together.

> 'To live together in the world means essentially that a world of things is between those who have it in common, as a table is located between those who sit around it; the world, like every in-between, relates and separates men at the same time.'[5]

Without a world that brings us together we would 'fall over each other' and we would have nothing more to say to each other. Arendt uses the image of a séance where the table around which a number of people are sitting drifts away. Because they are suddenly not separated from each other and also have nothing to hold on to, they can only stare blankly at each other.[6]

It would however be a misunderstanding to think that the only possible connection between people is through material items. Even though they are necessary, as an intermediary, the connecting element is ultimately locked in something that is immaterial and that is namely acting and speaking together. That is strange because, in her search for something that gives permanence to existence, Arendt puts forward the world with the public realm. Nothing is so transient as acting and speaking. Perhaps this must be understood as a field of tension which is necessary for

4 H. Arendt, *The Human Condition* [HC], 1958, p. 56
5 *Ibid.*, p. 52.
6 *Ibid.*, pp. 59- 60.

a relationship. Acting and speaking are only possible when there is a stable foundation for them. What connects people is speaking and this is where the communication aspect of the public realm comes into play. Again Arendt points to the Greeks. According to her it was in the Greek polis that acting and speaking found their place.

> 'The polis, properly speaking, is not the city-state in its physical location; it is the organization of the people as it arises out of acting and speaking together, and its true space lies between people living together for this purpose, no matter where they happen to be.'[7]

Acting and speaking create a space, a space where people can let themselves be seen in front of each other and show who they are. Only those who have access to this space have access to reality because, for Arendt, reality is the same as being seen and heard.[8]
This primary characterization of the public realm must suffice to understand the place that law occupies there.

4. Law and the public realm

Arendt primarily leans on the interpretation of Roman law in her approach to law, where the emphasis is put on the notion of law as a relationship.[9] The idea of connectedness is central and not orders and obedience. Arendt is of the opinion that the original meaning of 'lex' lies in the idea of 'an intimate connection'. The law connects two partners who are brought together by external circumstances.[10] Montesquieu, according to Arendt, was probably the last person who recognised the relational character of legal regulations and law, when he explained the term law as meaning *rapport*.[11] We can see that like the table connects and divides the people who are sitting around it, so, too, does the law connect and divide people who come together in society. A contract is an example of this legal connection. There is a shared world in the contract and a simultaneous connection, but also an in-between space separating two parties.[12]
It is important to stress here that, according to Arendt, the connection within the law only comes into being with legislation, or by contracting itself, and is not possible beforehand, as can be the case with natural law ideas. 'The law is something that establishes new relationships between men, and if it links human beings to one another, it does so not in the sense of natural law, in which all people recognize the same things as good and evil on the basis of a voice of conscience implanted, as it were by nature, or as commandments handed down from above and promulgated for all people, but in the sense of an agreement between contractual partners.'[13]
It is clear from all of this that law is indeed an important structuring agent for the public realm, as Arendt understands it. To understand what Arendt means one only has to think of the constitution as the structural foundation for the political establishment.[14] An important condition for the realization of the public realm is, as Arendt understands it, that the people within it are consid-

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7 *Ibid.*, p. 198.
8 *Ibid.*, pp. 198-199.
9 Cf. A. Hol, 'Authority. Law and the Roman experience', in L. de Ligt et al. (eds.), *Viva Vox Iuris Romani. Essays in Honour of Johannes Emil Spruit*, 2002, pp. 39-50.
10 H. Arendt, *On Revolution* [OR], 1990, p. 187.
11 *Ibid.*, p. 188.
12 H. Arendt, 'Introduction into Politics' [IP], in H. Arendt, *The Promise of Politics*, 2005, pp. 178-180.
13 *Ibid.*, p. 180. See for Arendt's ideas on natural law: Hannah Arendt, *On the Origins of Totalitarianism* [OT], 1976, pp. 461 et seq.
14 Cf. J. Waldron, 'Arendt's Constitutional Politics', in D. Villa (ed.), *The Cambridge Companion to Hannah Arendt*, 2000, pp. 201 et seq.

ered equal. This equality is firmly anchored in Western constitutions and forms the skeleton for the modern legal system. It is also this artefact that provides the basis for equality. 'Isonomy guaranteed … equality, but not because all men were born or created equal, but, on the contrary, because men were by nature … not equal, and needed an artificial institution, the *polis*, which by virtue of its *nomos* would make them equal.'[15]
It is not only equality that gets legal status but pluralism also, it is implied in the notion of the in-between space and is a very recognizable Arendt idea as she sees contract and law as compromises. Equality and the recognition of pluralism lead to communication and it is this communication that Arendt emphasises again when she talks about the establishment and development of law and contracts. A law or contract, according to Arendt, is something that 'comes into being not by diktat or by an act of force but rather through mutual agreements'. The fabrication of a law or a contract is always 'tied to proposals and counterproposals' and always results in a compromise.[16]
The relativity – in the sense of depending on relationships, connections – in Arendt's legal concept implies that the authority of law and justice are not dependent on sources that lie outside the political realm, such as divine orders or any other natural reason. The source of authority is inherent in politics and is based on the consent of the people, which is fundamental to laws.[17]

From the above one could be led to believe that people are brought together by the law in itself and that is indeed correct as far as law is seen as an artefact that gives people a structure to communicate with one another, like as Arendt illustrated with the table metaphor. Law is itself in exactly the same situation as the table. Ultimately it is acting and speaking that are made possible, by the table, and now also by the law in our case, where an in-between space is created for human beings. In this sense we can better speak of law as a precondition for the public realm and in a certain sense its backbone. Law offers a structure within which communication is possible. With all its rules and regulations it offers human relations, that are particularly fragile owing to the coincidental and temporary nature of human beings, stability and something to hold on to. Acting and speaking are only possible through the hold-on that the rules and regulations of law give. What this amounts to is that it is actually only through legal restrictions that something like human freedom is made possible, or as Arendt herself wrote in one of her earlier works:

> 'Positive laws in constitutional government are designed to erect boundaries and establish channels of communication between men whose community is continually endangered by the new men born in it. With each new birth, a new beginning is born into the world; a new world has potentially come into being. The stability of the laws corresponds to the constant motion of all human affairs, a motion which can never end as long as men are born and die. The laws hedge in each new beginning and at the same time assure its freedom of movement, the potentiality of something entirely new and unpredictable; the boundaries of positive laws are for the political existence of man what memory is for the historical existence: they guarantee the pre-existence of a common world, the reality of some

15 OR, *supra* note 10, pp. 30-31.
16 IP, *supra* note 12, p. 179.
17 Cf. about Arendt's idea of authority: P. Ricoeur, *Lectures 1*, 1991, p. 20 et seq.; M. Canovan, *Hannah Arendt. A Reinterpretation of her Political Thought*, 1992, pp. 218 et seq.; Hol, *supra* note 9.

> continuity which transcends the individual life span of each generation, absorbs all new origins and is nourished by them.'[18]

Freedom is possible because of the stability that the law gives. It guarantees a social world within which man can continually begin afresh. The law is not indifferent to what is brought forward within its structure. It is evidently fed by the activities of individuals and knows how to adjust itself to this.
This was a description of Arendt's concept of law and its relation to the public realm. Let us now take a brief look at how the administration of justice can take its place within this concept.

5. Public realm and administration of justice

There are few references to law in Arendt's work and practically none on the administration of justice. Nevertheless, it is not difficult to fit this social institution into what she says about the public realm. The administration of justice plays a vital role in the realization of the law. What is remarkable in connection with this is that the administration of justice itself can be understood as an artefact that facilitates acting and speaking. As Huizinga so aptly put it, the administration of justice can be understood as a game, that is by definition an artefact.[19] A comparison with the theatre could just as easily be made. Do all the parties not play a role in judicial procedures? Think of the special clothes that are worn, the repetition of certain phrases and the remarkable large settings of court buildings. Even when a party within the theatrical setting of a court case does not distinguish himself outwardly from the man on the street, it still has to be understood that he is not present in the court as a private person, but as a public person playing the role of a legal figure. Arendt has developed this feature herself using a historical description of the Latin term *persona.* She wrote the following on this subject.

> 'In its original meaning, it signified the mask ancient actors used to wear in a play. (…) The mask as such obviously had two functions: it had to hide, or rather to replace, the actor's own face and countenance, but in a way that would make it possible for the voice to sound through. At any rate, it was in this twofold understanding of a mask through which a voice sounds that the word *persona* became a metaphor and was carried from the language of the theatre into legal terminology. The distinction between a private individual in Rome and a Roman citizen was that the latter had a *persona*, a legal personality, as we would say; it was as though the law had affixed to him the part he was expected to play on the public scene, with the provision, however, that his own voice would be able to sound through. The point was that "it is not the natural Ego which enters a court of law. It is a right-and-duty-bearing person, created by the law, which appears before the law." (…)'[20]

The administration of justice 'show' with all its theatrical trappings is necessary to raise the original conflict out of its daily context, because without such a legal structure, with all its procedures, it would perhaps not be possible to solve or end a conflict. The amount of conflicts would only increase when trying to find a solution – for example, in the form of revenge –

18 OT, *supra* note 13, p. 465.
19 J. Huizinga, *Homo ludens, Proeve eener bepaling van het spel-element der cultuur*, 1938, pp. 111 et seq.
20 OR, *supra* note 10, pp. 106-107.

because of oversensitive reactions, partial judgements and inequality between the parties. An objective institution that comes between and stands above the conflicting parties is necessary and inevitable if people want to come to an understanding with each other. The administration of justice with its procedural setting offers conflicting parties the space to fight out their differences in a controlled manner. The rules of the game see to it that the conflict is fairly fought out with fair and similar weapons. What all of this amounts to is that in a legal process people are first separated from each other and afterwards brought together again by participating in the legal proceedings.
This does not have to mean that court procedures are aimed at reconciling the parties. It is sufficient if the parties are brought to recognizing each other as equal interlocutors and also if they respect the outcome of the procedure, which also determines their "share" or place in society. In the administration of justice people are separated, but it also allows them to share (in the sense of partaking in).[21] Ricoeur, who has been influenced in many ways by Arendt's works, has expressed it as follows:

> '(…) [T]he act of judging has as its horizon a fragile equilibrium of these two elements of sharing: that which separates my share or part from yours and that which, on the other hand, means that each of us shares in, takes part in society.
> It is the just distance between partners who confront one another, too closely in cases of conflict and too distantly in those of ignorance, hate, and scorn, that sums up rather well, I believe, the two aspects of the act of judging. On the one hand, to decide, to put an end to uncertainty, to separate parties; on the other, to make each party recognize the share the other has in the same society (…)'[22]

Law and the administration of justice can be seen, in the light of Arendt's conception of the public realm, as institutions that give stability to society and so contribute to form the basis for a society where pluralism is recognized and communication is made possible. At the start of this article it was already noted that Arendt is pretty gloomy about the public realm, at this point in time, and so also about the possibilities for communication and political actions. It is not for no reason that she falls back on a description of Greek and Roman culture to illustrate the public realm. The questions that now arise are what could be the reasons for this breakdown in the public realm and whether we can recognize the effects of this within the realm of law and the administration of justice.

6. The disintegration of the public realm

6.1. Labour, work, and action

The destruction of the public realm is visible for Arendt by the fact that politics hold hardly any independent meaning in our society. In modern times politics are being increasingly seen as something instrumental. Political actions are seen in the light of certain social goals such as welfare and economic growth. It is economic processes that increasingly determine and drive our own, and political, activities. At the same time we see that there is less space for the citizen to

21 The Dutch and German terms for judging; '*oor-delen*', and '*ur-teilen*', clearly express this double function, since they literally mean both separating and sharing.
22 P. Ricoeur, *The Just*, 2000, p. 132.

partake in politics with this development. Politics have become a professional affair. In order to understand the situation better it is a good idea to briefly say something about the different forms of activity that Arendt distinguishes in society and their relationship to the public and private realms.[23]

Arendt divides activities into three categories: labour, work and action. These activities are closely allied to the state of human existence. This state can be understood in two ways. In the first place human existence, with all its limitations, must be seen as a state that makes the various activities necessary. The various activities can also be seen as a precondition for realising a (complete) human existence. It is interesting to examine the extent to which the activities of labour, work and action contain the possibility of providing the sought-after stability for fragile human lives, and at the same time the extent of justice that is done to the pluralistic society and the uniqueness of each individual. Let us take a quick look, then, at the three activities, keeping this question at the back of our minds.

Labour is necessary to produce consumable products, to ensure the biological survival of mankind. Characteristic of labour activities is that the goods produced are only created for immediate consumption and in this sense labour is unproductive: it does not create anything that is in any way durable and for this reason does not create any stability. Now we can say that as the activity of labour addresses itself solely to the necessities of biological survival that it is limited to the animal side of humankind. Because labour is determined by biological needs it implies, according to Arendt, that there is no room for pluralism or uniqueness, just as it is survival of the species that is important for animals and not so much the individual that is important.

The activity of work is for various reasons on a different level to labour. This activity has to do with the production of goods that are more durable, like instruments and buildings. Unlike consumer goods these products can give some stability to human existence because they are not for immediate use. The things that are so made create what Arendt describes with the term *world*. Even though some human qualities attain a certain stature in the making of things, that special quality that makes us humans cannot yet manifest itself. Pluralism is still not fully developed within the work activity. After all, work has principally to do with skills and trades where certain models and blueprints are followed. There is no question of individuality here. What is important is that certain houses are built, it does not matter who does it. On top of that, making things is an activity that can be carried out in the loneliness of a workshop. Cooperation is not an imperative condition for producing products.

This is completely different for the third activity, action, which is characterized by speech. Acting and speaking are unavoidably connected with the individual who speaks and can only attain stature in the company of others. What distinguishes humans from animals is also reflected in this activity. Survival of the species is the most important concern for animals, for people it is the individual and his uniqueness that comes to the fore, and with it the pluralistic character of human society. It is this pluralism that compels us to communicate. It is only through action and speaking that mankind can completely reach 'fulfilment' according to Arendt. Through this, human existence wins durability, even if speaking is transient, because it is possible to develop

23 *The Human Condition* chiefly consists of an analysis of the different activities.

a public memory with stories and language, and allows the individual to achieve a certain monumental stature.[24]

6.2. Instrumentalization and rationalization

If we now look at the place these different forms of activity take within society it comes as no surprise that Arendt places the first two in the private realm and the third, activity, in the public realm. Neither labour nor work are activities that are necessarily interpersonal in character. Labour is only related to matters that are strongly connected to the family (survival and also reproduction) and because it has to do with the biological side of mankind people prefer to hide these activities as much as possible and to shroud them in shame. It is only through action that people leave the basic necessities of pure survival behind them, come out in the open and consult with each other. Acting and speaking create the public realm.

When Arendt expresses her concern about the loss of politics and the associated disintegration of the public realm then this has to do with the shifts that have taken place in the pecking order of the different activities she has separated and the subsequent blur between the private and public realms that follows as a result of this. Arendt considers the growing domination of economics as characteristic for the modern world; labour is becoming a more important activity and threatening to absorb the other activities. The standard for judging human activity is increasingly coming to lie on a par with the value of survival and is being measured more and more in terms of economic use. The enormous fascination in our modern society with bioscience is a sign of this and mass consumption as well, which clearly shows its traits of unlimited and immediate satisfaction. We also recognize the increased domination of economics as a standard for usefulness and efficiency within numerous institutions. This also applies to politics themselves. According to Arendt, and also stated above, politics in modern society are primarily considered to be an instrument to promote economic processes. Politics that function as an instrument lead to less and less space for acting and speaking. Politics are becoming more and more administrative, with only a control function. Politics are becoming a space for working in and making things instead of being a forum for acting and speaking.

The result is, between one thing and another, that pluralistic society is coming increasingly under threat. The emphasis is coming to lie more on economics and the (biological) side of life (health, enjoyment) to the extent that the attention for the individual in society is shifting from highlighting his differences in comparison to others to seeing people as a sort of species of animals and only looking to what individuals have in common. It is not so strange that as individualism and pluralism begin to lose their meaning that bureaucracy, as a political form, wins terrain from democracy.[25]

6.3. Personalization

There is another phenomenon, directly connected to the fragmentation of the public realm, that requires some attention here. This phenomenon can best be described by the term personalization. We have already quickly addressed the theatrical character of acting in the public realm. A certain ‘de personalization’ of the actors is characteristic of this realm. They do not perform as private individuals but more as public figures. This does not mean, however, that the personal

24 Cf. Foqué et al., *supra* note 3.
25 Canovan, *supra* note 17, p. 118.

factor is completely eliminated. There is an element of de personalization because the person can only appear before the other represented by the role he plays. The metaphor of the mask expresses this best; the mask hides the face of the actor but allows his voice to be heard.
Here we encounter a field of tension. To achieve personality – and also individuality – one has to slot in with impersonal structures that are fixed in advance, and within which a role has to be played. In modern times people try to distance themselves from this field of tension. Arendt discerns in modern culture a continuous pursuit of authenticity together with a 'passion for unmasking society'.[26] This unmasking could be summed up as a form of personalization. Instead of taking the person seriously, as he presents himself in public, people want to gain an insight into the person who is hiding behind his role. The attention for the politician as a person (instead of the ideas that he presents as a politician) comes to the fore so clearly in modern democracies that this phenomenon can be seen as a manifestation of personalization.
One could argue that this personalization and unmasking is aimed against the hypocrisy of the public person who hides his real nature. The question is where does all this lead to? When the masks that facilitate the appearance of individuals in public, and in so doing make society possible, are taken away what is left is only a frustrated search for immediacy, closeness and intimacy where individuals are thrown back on themselves.[27] Is it not so that through personalization only a fragile basis remains for social relationships, because these come to rest on sentimentality (brotherhood) and can be kept under discussion because the question can always be asked whether the other person who is showing his 'true face' is really authentic.
The shift in the way we look at friendship illustrates the turnabout that Arendt speaks of. The emphasis in friendship is nowadays intimacy while the essence of friendship for the Greeks was discussion, according to Arendt.[28] This concept of friendship also disappears with the disappearance of the public realm, where people can come into contact with each other as partners in discussion. Instead of this a yearning for intimacy arises, as compensation for the loss of reality that goes together with the disappearance of the public realm.[29] Affections, that were limited to the private realm of the family, are being more and more transposed to the whole of society. According to Arendt a sort of sentimentality is developing where all that people want to feel is brotherly affection for each other.[30]

6.4. Disappearance of politics?

Arendt paints a gloomy picture of the modern world, a world where politics are disappearing and where, in their place, a state of extreme rationalism is developing, where democratic elements are being pushed to the background and a definite rationalism that manifests itself in administrative and bureaucratic thinking is coming to the foreground. This rationalism seems to have to be compensated by embedding a broad intimacy and sentimentalism in society.
An observation of the present political establishment teaches us that the tendencies described by Arendt are indeed recognizable. The problems arising from a strong administrative approach to social problems, and the instrumentalization of the law as a result of this, have been clearly recognized and given attention both inside and outside the academic world.[31] The relentless

26 Cf. OR, *supra* note 10, p. 108.
27 Cf. D. Villa, *Politics, Philosophy, Terror. Essays on the Thoughts of Hannah Arendt*, 1999, pp. 128 et seq.; Richard Sennett, *The Fall of Public Man*, 1992.
28 H. Arendt, *Men in Dark Times*, 1995, p. 24.
29 Sennett even talks about the tyranny of intimacy, cf. Sennett, *supra* note 27, pp. 337 et seq.
30 Arendt, *supra* note 28, p. 13.
31 Cf. amongst others Foqué et al., *supra* note 3; M. Bovens et al. (eds.), *Het schip van staat. Beschouwingen over recht, staat en sturing*, 1985.

search for intimacy has also become visible in the modern political establishment. Particularly the way citizens express their ideas on a just society and the increased attention for the person behind the politician plus the need for direct contact with public representatives, on the street or in bar, all bear witness to this.[32] If we compare the protest gatherings of the sixties and seventies with the silent marches of the last decade then we can say for sure that there is a movement from communication to intimacy in the search for basic solidarity between people.
The question is whether the tendencies pointed to here can also be recognized within the law and the administration of justice.

7. Instrumentalization and personalization within the law and the administration of justice

7.1. Instrumentalization and rationalization

We can observe similar tendencies in the law field and the administration of justice that fit the picture concerning politics sketched above, even though a warning has to be given that this obviously has to be put into perspective, so that certain phenomena are not overexaggerated. A combination of factors, partially dictated by politics, economics and social developments, have activated a change in the culture of the legislature, to the extent that there are signs of rationalization and instrumentalization. More and more attention is given to using available resources economically because of the growing tendency towards the transparency of governmental organizations and of course the growing caseload as well. How these measures influence the culture of the legislature is probably best demonstrated by the change in language terms: there is now talk of products (judgements), production standards and clients (parties in lawsuits). The increased amount of so-called bulk cases leads to a further rationalization of the administration of justice. Guidelines or coordination points, for example, are being developed in connection with the sentences for certain types of criminal cases in order to simplify the decision-making process of individual judges and also to promote legal unity. The decision-making process is being streamlined and in this way rationalized. This sort of development places the individual responsibility of the judge in a different light. A certain amount of bureaucracy is unavoidable. There are also other forms of bureaucratization in the judicial organization. More attention is being given to developing a greater division of tasks both in the administration and management of courts as well as in the field of professional expertise, and not only the specialization of judges but also a shifting of tasks to the support staff.[33]
From the public realm perspective these tendencies do not have to be seen as being absolutely negative. On the contrary, we cannot criticize the rationalizing of the judicial organization as long as it contributes to its improved functioning as a forum for debate. After all, a judicial organization that is not very accessible, operates too slowly and where judgements are made contrary to the principle of equality will lose its power after a while. The real question is how much rationalization can such an organization undergo, bearing in mind the importance of communication between citizens, a factor made possible by the judge acting as an intermediary. After all, efficiency in combination with expertise can lead to a strong technocratic approach to solving

32 This issue, as far as the effects on the democratic State under the rule of law is concerned, is interestingly elaborated in D. Pessers, *Big Mother, Over de personalisering van de publieke sfeer*, 2003.
33 Cf. among others P. Langbroek et al. (eds.), *Kwaliteit op de weegschaal*, 1998; A. Brenninkmeijer (ed.), *De taakopvatting van de rechter*, 2003; C. Cleiren et al., *Rechterlijke samenwerking*, 2002; Hol et al., *supra* note 1.

conflicts, resulting in a lesser role for the citizens involved. Damage will be done to what is really essential to the public realm: communication between citizens on equal terms.[34]
There is another phenomenon on the horizon, best described as the 'marketing' of conflict solutions, that has to do with the instrumentalization of judicial procedures. There is a tendency to consider the administration of justice – partly due to the influence of the privatization gulf of the last decade – as a service that has to compete with other similar conflict-solving services. Besides the administration of justice there is also the possibility of arbitration, mediation and negotiation. People will be primarily led by costs, the duration of the procedures and the extraction of a desired solution when making a choice between the alternatives on offer. Loth speaks here – following Luban – of a 'conflict-solving conception' of the administration of justice.[35] But, according to him, there is more to the administration of justice than that and by more he means expression in the public life conception. The administration of justice is seen as a follow-up to the political decision-making process and is a vital link in the public debate. According to Loth, the freedom of the citizen is not restricted to the private sphere of the market, but also exists in the self-realization of the individual in the political community.[36] The administration of justice must be seen as a place where, within the rules of the game and using the legal language, consensus can be reached on a legal level in a political community.

7.2. Personalization

This last point about reaching a consensus brings us to the phenomenon of personalization. There is an undeniable tendency towards personalization in the administration of justice, in the sense that there is more and more interest in the person who hides behind the mask of the legal figure. Such a tendency can only be positively appreciated against the background of what has already been said about the uniqueness of individuals that has to shine through in the public debate, and for which the mask also has to make room. However, there are also risks involved.
One risk is that unrealistic expectations arise in connection with the administration of justice. The recognition sought after here is not that of the legal person and his judicially-sanctioned position, but that of the 'authentic' person with all his sentiments and emotions. The question is whether, within the legal context and the administration of justice, enough room for such recognition can be created. A case is finished, on the administration of justice level, if, for example, the one party is prepared to pay compensation for the damage suffered by the other, but there is the possibility in the event of extreme personalization that more and particularly other sorts of atonement will be needed. Besides the compensation perhaps an apology will also be sought from the wrongdoer, who in his turn can possibly ask for forgiveness. It is predictable that such longings will lead in many cases to frustrating settlements, because – when parties are prepared to do something – the uncertainty will always remain whether the apology or the forgiveness were really authentic. It is not for no reason that forgiveness and reconciliation are not legal categories. These concepts would weigh down the legal system too much with personal aspects, with the result that it would

34 An elaborated theoretical concept that points in this direction can be found in the legal economic approach to the administration of justice by Posner. This seems to restrict the administration of justice to a means of promoting social efficiency. The contribution of parties in a lawsuit can then also only be derived from this function. There can be no question of communication within the administration of justice. Cf. R. Posner, *The Problematics of Moral and Legal Theory*, 1999, pp. 185 et seq., pp. 206 et seq; A. Hol et al., 'Iudex mediator; naar een herwaardering van de juridische professie', 2001 *R&R*, no. 1, pp. 14 et seq.

35 M. Loth, 'Rechtspraak en mediation; een liaison dangereuse?', in A. Brenninkmeijer (ed.), *De taakopvatting van de rechter*, 2003, p. 42. Cf. also D. Luban, 'Settlements and Erosion of the Public Realm', 1995 *The Georgetown Law Journal*, pp. 2619-2662.

36 Loth, *supra* note 35, p. 43.

not be able to do justice to its role as a consensus-creating body.[37] This is very well expressed by the lecturer David Lurie who is being tried by a university commission following an affair with a student in Coetzee's novel 'Disgrace'. As a reaction to a request, after the interrogation, to show public regret he says the following 'I appeared before an officially constituted tribunal, before a branch of the law. Before that secular tribunal I pleaded guilty, a secular plea. That plea should suffice. Repentance is neither here nor there. Repentance belongs to another world, to another universe of discourse.'[38]

From this last point another risk becomes visible. If it is correct to assume that formalities stand in the way of personal expression, then this implies that personalization will inevitably lead to informality. This informality, however, creates the risk that the debate carried out within the procedures will become more difficult because there is no longer any clear structure for it. It could mean that instead of people coming together more easily, overall consensus will no longer be reached.

There are a few developments within the law and the administration of justice that should be seen in this light. In the first place, there is the underlying question of formalities and ceremonies within the administration of justice. In order to reduce the gap between the parties and the judge it has sometimes been suggested that the people involved in court cases should be able to present themselves in everyday ways. For example, no gown is worn in certain court proceedings (the family division, juvenile cases, judges in the lower courts). Undoubtedly this can contribute to a more open atmosphere for communication. However, there can also be certain disadvantages attached to this. It cannot be ruled out that the people involved in a court case will find it more difficult to play a role. Should the juvenile delinquent direct himself to the probation officer, the psychologist who is called in as a specialist, the public prosecutor or the judge? With informal relationships the various roles will possibly become mixed up and in the most extreme case the proceedings will coincide with an everyday exposé of the conflict in question. This evokes a Kafkaesque scene of court proceedings where no distinction can be made between what does and does not form a part thereof . In this way the structuring power or the law comes under pressure.[39]

The personalization of court proceedings is also visible in other ways like, for example, the changed position of the victim within the law.[40] Recently, more room has been created for the victim to appear as a person, now that he has the right to speak in criminal law cases. His position in the proceedings was previously confined to that of a witness and a joining civil party. This last position already provides some room for the victim to express his feelings as a human being. The purpose of his right to speak is to create more space for this. The discussion on so-called restorative justice is a further indication.[41] The plea for restorative justice has to be understood as a reaction to the one-sided dominance of attention for the offender in criminal law and to create more attention for the importance of restitution to the victim in the criminal law process (and not only society or the legal community in general).

It is not only in criminal law, but also in civil law, that we see the person emerging from behind the legal figure. In the first place, we see that damages, in the already longer-running develop-

37 Cf. Paul Ricoeur, 'Sanction, Rehabilitation, Pardon', in Ricoeur, *supra* note 22, pp. 133 et seq. See also M. Minow, *Between Vegeance and Forgiveness. Facing History after Genocide and Mass Violence*, 1998; J. Murphie, *Getting Even. Forgiveness and its Limits*, 2003.

38 J. Coetzee, *Disgrace*, 2000, p. 58.

39 Cf. A. Garapon, *Bien juger. Essai sur le rituel judiciaire*, 1997, pp. 249 et seq. The question highlighted here played a role in the arguments for a recently implemented change to the juvenile administration of justice. Cf. Hol et al., *supra* note 1, pp. 41-44.

40 Cf. *Het opstandige slachtoffer, Genoegdoening in strafrecht en burgerlijk recht*, Handelingen Nederlandse Juristen Vereniging, 2003, with preliminary advice from A. Zijderveld, C. Cleiren, C. du Perron.

41 Cf. amongst others L. Walgrave (ed.), *Restorative Justice and the Law*, 2002.

ment, - and other than financial interests – have legal recognition under civil law. The awarding of financial compensation for all sorts of damage has become daily practice. The latest development has to do with the problem of so-called emotional damage. A plea is being made to grant more recognition, within the laws of liability, for damages that occur to the direct family of a victim as a result of an illegal crime. The case of Jeffrey is interesting in connection with this. Jeffrey was drowned in the swimming pool of a hospital after having therapy. His mother asked the civil judge for a legal statement from which it would be clear who was guilty of drowning her son. This statement was important, according to her, to get through the period of mourning. The judge refused to make a statement on the question of guilt and considered the demand of the mother to be inadmissable, because this was not related to legally recognised interests. The damage is what matters in civil law and not this sort of quasi-symbolic action. This case in itself does not say so much about the change in the position of the person within the law, but what is interesting is the critical reactions to the statement from some legal specialists.[42] Such ideas – not based on the interest of financial gain – could gain recognition within civil law.[43] Again this can be understood as a plea for more personal space for the person hiding behind the legal mask.
Finally, the rise in interest in ADR must be mentioned, an interest that is not so amazing given the background of personalization. This can be taken as an advantage and seen as a positive thing, after all the less formal the setting, as in the case of mediation, the more space for handling a case. The enormous interest by non-lawyers in mediation can perhaps be best explained by the fact that this procedure offers a larger scope for contributing different personal aspects.[44] The personalization in ADR also seems to be connected to a certain privatization in the solving of disputes, in the sense that the procedures seem to involve limited participation in the public realm. These limitations become clearer when one considers that the proceedings, other than in normal legal proceedings, have a closed and trusted character. In this way they avoid the public realm, which is detrimental to the preservation of its existence. The standards that are developed in ADR procedures to solve a conflict are so tied to the specific circumstances of a case and the personal views and interests of the individual parties involved that they never seem to qualify for generalization. It makes no sense to deduct broader applicable standards from these.[45] The development of standards, and with it legal development, are recognized as explicit functions of the administration of justice. In the case of ADR these functions are not a matter for consideration.[46]

Additional phenomena to those pointed out here could be added. Nevertheless it can be stated that the developments put forward point to a clear nuance of change within the law and its procedures, the individual behind the legal mask is becoming more visible. This does not imply that we have to take it as being completely negative, some positive features have been mentioned in the development surrounding the rationalization of the judicial organization. After all, the mask does leave enough room to enable the voice of the person to be heard. Again the question is how much

42 Cf. G. van Maanen (ed.), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed*, 2003.
43 Cf. for the tendencies highlighted here in civil law C. du Perron, 'Genoegdoening in het civiele recht', in *Het opstandige slachtoffer, Genoegdoening in strafrecht en burgerlijk recht*, Handelingen Nederlandse Juristen Vereniging, 2003, pp. 105 et seq.
44 Even though within some mediation practices the contribution of these personal aspects are actually not encouraged and parties are advised to cut themselves away from the original problem and the position they have taken, it must be said that mediation has the greatest chance of succeeding when the parties involved are taken so far that they focus on the future and see with an eye to this what the interests of everyone is. However one puts it mediation seen in this way is only concerned with personal satisfaction.
45 Of course that can happen, but then the ADR procedures will again become more like the ordinary administration of justice where more defined and sharper norms and standards are used and less attention is given to the various specialties of the case.
46 Cf. Loth, *supra* note 35, pp. 45-46.

space for personal contribution can the law allow if it wants to offer an original impersonal basis for communication between parties.

8. The public realm as the 'Middle'

This article has tried to make the idea of Arendt's public realm fruitful in the analysis of modern law and the administration of justice. Two threats to the legal system were brought to our attention. On the one hand, there is the threat of rationalizing and instrumentalization and, on the other, there is the threat of personalization and sentimentalism. These threats can be understood as two sides of the same coin and have everything to do with the disintegration of politics that needs the public realm as a stage on which to act. This disintegration manifests itself, on the one hand, through a strong de personalization of society exposed in the bureaucratic administrative culture and, on the other, by a strong personalization, in the sense that individuals, now that they are cut-off from the public realm, are locked in the private realm and thrown back on themselves. What is remarkable about this situation is that a relationship disappears while in Arendt's opinion of the *persona* there is a relationship between the personal and impersonal. In other words: there is no intermediary between the personal and impersonal (that facilitates involvement with the other). What this amounts to is that if the public realm disintegrates, then something that could be described as a facilitator also disappears. This middle-point facilitator operates a field of tension between the preordained structures for individuals, on the one hand, and, on the other, the personality of the individuals that want to manifest themselves and win a place in the world. Gillian Rose has noted this relationship of tension as tension between law and love.[47] While law represents the general and absolute order from which nobody can escape, love promotes contingency, the individual and unforced behaviour. Throughout history these two elements have often been placed against one another; the law is placed within the Jewish culture and love within the Christian culture. Rose sees them however as forming a relationship of tension and she calls the space the Middle, within which this field of tension exists. In this Middle the hardness of the law is broken by the contingency of love and, the other way round, the law offers a certain contrast to love.

The idea of the Middle, as developed by Rose, can easily be translated into the idea of Arendt's public realm and within it the place of the law. The law, with its nucleus of laws, gives structure and stability to society so that individuals can behave accordingly. At the same time the public realm that is created by the law gives space to each individual to make his own contribution. In this way law and adjudication can bring people together; not on the basis of one or other pre-existing natural form of solidarity, but by creating a place for debate pivoted on a socially-orientated background that is facilitated by the law. Law and the administration of justice have, in this sense, intermediary functions. They present and maintain an order that creates space for the individuality of the legal person and at the same request that every person should recognize the existence of other legal people, all with their own separate individuality. In other words, law and the administration of justice protect, to a certain extent, the personal environment of each individual, but require this same individual to rise above this environment and to partake in the public realm. Law and the administration of justice provide a stage for this. Only in this way can justice be done to human dignity, or as Pessers has expressed it:

47 G. Rose, *The Broken Middle. Out of our Ancient Society*, 1992.

> 'The dignity of the human being is … the dignity of a *homo duplex*: identity and self-respect of the individual are not only produced in the private sphere of intimacy and immediate satisfaction of needs, but also by the opportunity to free himself from this sphere in order to partake in a public community, where he can secure an identity as a citizen, have rights and duties, and in which he becomes a member of a world that is much older than he himself is.' [48]

This intermediary function of law and the administration of justice implies a heavy responsibility for the legal decision-making process. After all, if the field of tension between the law and love is to be kept intact and between the private and public life then the responsibility for a decision can never ever be easily taken, by simply referring to a previously existing rule. An indication will have to be given if and in which way account has been taken of the individual and personal side of the case. It is not easy, the other way round, to satisfy the individual wishes of the legal person, but it will have to be stated if and to what extent the law (the regulations) can be satisfied, this in connection with the protection of the legally protected interest of the other members of society. Such responsibility, that prevents a one-sided relapse to the instrumental approach or to a simple personal approach, comes forth from the role that figures of authority, such as judges, have to play in order to keep the public realm intact. The tendencies towards personalization and rationalizing within the law and the administration of justice that have been mentioned above underline the necessity for thinking through these responsibilities.[49] Arendt's thinking and ambitions offer an obvious fruitful foundation.

48 Pessers, *supra* note 32, pp. 43-44. (translation by the author)

49 Cf. Z. Bankowski et al., 'Living In and Out the Law', in P. Oliver et al. (eds.), *Faith in Law, Essays in Legal Theory*, 2000, pp. 33 et seq. Arendt saw in her analysis of bureaucracy a clear deficiency of responsibility and this was visible to her in an extreme form in the character of Eichmann. Cf. on this M. Bovens, *The Quest for Responsibility. Accountability and Citizenship in Complex Organisations*, 1998. Cf. about Eichmann H. Arendt, *Eichmann in Jerusalem, A Report on the Banality of Evil*, 1994.